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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 502. 55

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,
Appellant,

vs.

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

MOTION OF THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, APPELLANT, TO ADVANCE.

Respectfully submitted,

CHARLES MCHENRY HOWARD,
CHARLES MARKELL,
HENRY H. WATERS,
Counsel for The United Railways and Electric Company of Baltimore, Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 792.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,
Appellant,

vs.

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND.

MOTION OF THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, APPELLANT, TO ADVANCE.

Now comes The United Railways and Electric Company of Baltimore (hereinafter called the Company), appellant in the above entitled cause, and moves that this case be advanced for an early hearing. In support of its motion the Company makes a brief statement of the matter involved and the reasons relied on for the advancement of the hearing of this case.

STATEMENT OF MATTER INVOLVED.

This is an appeal by the Company from a final decree affirming dismissal of a supplemental bill to enjoin enforcement of certain orders of the Public Service Commission of Maryland (hereinafter called the Commission) limiting the Company's carfares and claimed by the Company to be confiscatory. The decree of the Court of Appeals was passed on March 20, 1929; the Company's appeal was applied for and allowed on March 23, 1929. [R. 1716-1718.]

On August 1, 1927, the Company applied to the Commission for an increase in fares (then limited by Commission order to 7½ cents token fare or 8 cents cash) to 10 cents flat. [R. 89.] On February 10, 1928, the Commission passed an order denying the Company's application for a flat 10-cent fare and limiting fares to 8⅓ cents (or 9 cents cash), which the Commission estimated would yield the Company a return of not more than 6.26 per cent. on the undisputed value of its property. [R. 57-59.] The Company filed a bill in the Circuit Court No. 2 of Baltimore City to enjoin enforcement of the order of February 10, 1928, or prior orders as confiscatory because (1) limitation of the Company's rates to yield not more than 6.26 per cent. is confiscatory and (2) the Commission's annual depreciation allowance was fixed on a wrong basis, cost instead of present value of depreciable property, and was grossly inadequate, and the Commission rates therefore would actually yield far less than 6.26 per cent. [R. 5-12.]

The Circuit Court held the Commission's orders and rates confiscatory on both of these grounds and enjoined enforcement. On July 16, 1928, the Court of Appeals (*a*) reversed in part the decree of the Circuit Court and held (CHIEF JUDGE BOND and JUDGE PARKE dissenting) a return of 6.26 per cent. not confiscatory and (*b*) remanded the case to the Commission for further proceedings to determine a proper depreciation allowance, based not on

cost but on present value, and make any rate changes necessary to yield the same estimated return, *i. e.*, not more than 6.26 per cent. [*Public Service Commission vs. United Railways Company*, 155 Md. 572; *sub nomine West vs. United Railways and Electric Co.*, 142 Atl. 870.] On November 19, 1928, the Company's appeal (and also the Commission's) from that decree of the Court of Appeals were dismissed for lack of jurisdiction on the ground that the decree of the Court of Appeals was not a final decree. [*United Railways and Electric Company of Baltimore vs. West*, October Term, 1928, No. 464; *West vs. United Railways and Electric Company of Baltimore*, October Term, 1928, No. 465; 278 U. S. , 49 S. Ct. 79.]

Pursuant to the opinion of the Court of Appeals the Commission on November 28, 1928, determined the proper annual depreciation allowance to be $755,116 more than its previous allowance and accordingly amended its order of February 10, 1928, by limiting fares to 8¾ cents (or 10 cents cash) instead of 8⅓ cents (or 9 cents cash). [R. 1695-1697.] This increase in fare was allowed to furnish *only* increased revenues equal to the increase in depreciation allowance, *i. e.*, to yield not more than 6.26 per cent. [R. 1695, 1699.] The Company filed a supplemental bill in the Circuit Court to enjoin enforcement of the Commission's order of February 10, 1928, as amended by the order of November 28, 1928, as confiscatory. [R. 1681-1689.] The Circuit Court, in accordance with the opinion of the Court of Appeals, dismissed the supplemental bill; the Court of Appeals, for the reasons given in its opinion on the first appeal, affirmed the decree dismissing the supplemental bill. [R. 1712-1716.]

REASONS RELIED ON FOR ADVANCEMENT.

The principal question presented on this appeal is whether the Commission's limitation of rates to a return of not more than 6.26 per cent. is confiscatory—the uncontradicted evidence showing that since July 1, 1920, the average cost to the Company of *borrowed* money (other than current bank loans) was 7.23 per cent., the lowest 6.6 per cent, the last 7.32 per cent. [155 Md. 611, 591, 142 Atl. 884-885, 875. R. 1658, 1638], and that this experience is quite in line with the general situation of street railways, though not of other business generally. [R. 1145, 1146.] The Commission rates which the Company claims (and two of the eight judges of the Court of Appeals, as well as the judge of the Circuit Court, hold) to be confiscatory are actually in force and have been in force ever since November 30, 1928.

Until November 30, 1928, throughout the period from the Company's application to the Commission for relief on August 1, 1927, Commission rates still more confiscatory—and ultimately held by both the Circuit Court and the Court of Appeals to have been confiscatory—were continuously in force. For actual losses sustained, so long as past or present confiscatory rates have been or shall continue in force, the Company has no possible redress. The difference between a return of 6.26 per cent., the Commission's maximum estimate, and a return of 8 per cent., to which the Company claims to be entitled, amounts to $1,305,000 per annum (on an undisputed value of $75,000,000). If the position of the Company (and of the two dissenting judges of the Court of Appeals) is eventually sustained by this Court, these losses can never be recovered.

The instant case affects practically all carfares in Baltimore. The questions presented are of public interest to the Commission and to the people of Baltimore as well as to the Company. The Company however is forced to bear the entire loss until the decision of this Court, even if the deci-

sion is eventually in favor of the Company. Interlocutory relief is impossible. The practical difficulties of providing for a possible refund of part of every carfare in Baltimore —and the action of this Court a year ago in the New York carfare case—make it useless for the Company to ask the Court of Appeals or this Court to stay the Commission's rate order and permit the Company to charge higher rates *pendente lite* and give security for refunds. The only possible means therefore of minimizing the heavy losses already sustained by the Company and still being sustained, in the event that the Company's position is ultimately upheld by this Court, is advancement of the hearing of the instant case by this Court.

If the instant case is advanced, the Commission's cross-appeal, No. 826, will (if not dismissed for lack of jurisdiction) doubtless also be advanced. The Commission's appeal presents only one question, viz., whether the Company's annual depreciation allowance should be based on present value or on cost.

Respectfully submitted,

CHARLES MCHENRY HOWARD,
CHARLES MARKELL,
HENRY H. WATERS,
Counsel for The United Railways and Electric Company of Baltimore, Appellant.

The appellees consent to advancement of this case for hearing at any time after the present term.

RAYMOND S. WILLIAMS,
THOMAS J. TINGLEY,
Counsel for the Public Service Commission of Maryland, Appellees.